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No. 86-1451

In The
Supreme Court of the United States
October Term, 1986

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA AND THE SIOUX TRIBE OF INDIANS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF THE PETITIONER

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12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THE TREATY ISSUES ARE MERITORIOUS.. 2

A. The teraty issues are not academic, but are issues important to the public 2

B. The Federal Circuit sanctioned a departure by the Claims Court from accepted and usual course of judicial proceedings within the meaning of Supreme Court Rule 17.1 (a) by refusing to address the treaty issues 2

C. Respondent misconstrues the nature of the 1980 Court of Claims decision 3

D. The treaty cession theory is contrary to the express language in the 1877 Act 4

E. The issue in this case is how the United States acquired Sioux territory 5

F. Sioux claims under the 1877 Act can be raised in Docket 74 6

II. THE ISSUE OF WHETHER THE PETITIONER CAN BE SEVERED FROM DOCKET 74 IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT..... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046 (Fed.Cir. 1986) 5

Rice v. Sioux City Memorial Park, 349 U.S. 70 (1955) 2

Sioux Tribe of Indians v. United States, 8 Cl.Ct. 80, 118 (1985) 8

Sioux Tribe v. United States, 500 F.2d 450 (Ct. Cl. 1974) 6

Sioux Tribe v. United States, 38 Ind. Cl. Comm. 467 (1976) 6

Stone v. Powell, 96 S.Ct. 3037 (1976) 7

United States v. Kagama, 118 U.S. 375 (1886) 2

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 5, 6

United States v. Sioux Tribe, 222 Ct. Cl. 421, 616 F.2d 485 (1980) 3

TREATIES AND STATUTES:

1851 Ft. Laramie Treaty (11 Stat. 749) ..... *passim*

1868 Ft. Laramie Treaty (15 Stat. 635) ..... *passim*

Article 1 of the 1877 Act (19 Stat. 254) 4

MISCELLANY:

Rule 17, U.S. Supreme Court 2

Rule 17.1, U.S. Supreme Court 2, 3

Rule 17.1(a), U.S. Supreme Court 3

Rule 22.5, U.S. Supreme Court 1

Rule 54(c), U.S. Claims Court 7

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INTRODUCTION

This Reply Brief is filed pursuant to Rule 22.5 of the Rules of the United States Supreme Court and addresses issues presented in the Memorandum In Opposition Of Respondent Sioux Tribe of Indians (hereinafter "Memorandum").

ARGUMENT

I. THE TREATY ISSUES ARE MERITORIOUS.

A. The treaty issues are not academic, but are issues important to the public.

The granting of a writ of certiorari is discretionary and occurs only when there are "special and important reasons therefor." See U.S. Supreme Court Rule 17.1. "Special and important reasons" in Rule 17.1 "imply a reach to a problem beyond the academic." See *Rice v. Sioux City Memorial Park*, 349 U.S. 70, 74 (1955).

The treaty issues raised in this case are not academic. They are issues important to the American public who have an interest in seeing that historic Indian land claims are resolved in the fair and honorable manner Congress intended.[1]

B. The Federal Circuit sanctioned a departure by the Claims Court from accepted and usual course of judicial proceedings within the meaning of Supreme Court Rule 17.1(a) by refusing to address the treaty issues.

Respondent argues that the Petition for a Writ of Certiorari (hereinafter "Petition") should be denied because it does not meet the criteria set forth in Rule 17. Memorandum at 3.

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[1]Indian tribes are wards of the Federal Government. *United States v. Kagama*, 118 U.S. 375, 383 (1886). The American public has an interest in seeing that their Government properly carry out its trust responsibility by paying Indian tribes fair and adequate compensation for land through the Indian Claims Commission process.

Rule 17.1 (a) provides that the Court may exercise its discretion in granting a review on certiorari "(a) [w]hen a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision."

The accepted and usual course of judicial proceedings regarding interpretation of Indian treaties includes adherence to rules of treaty construction established by the Court. These rules, which are set forth on page 19 of the Petition, have not been followed by either the Indian Claims Commission or lower federal courts in this case.

By refusing to address the treaty issues, the Federal Circuit sanctioned a departure by the Claims Court from the usual course of judicial proceedings within the meaning of Rule 17.1.[2]

C. Respondent misconstrues the nature of the 1980 Court of Claims decision.

Respondent asserts that the Court of Claims has already "determined that the certain Sioux lands were ceded to the United States under the Treaty of April 29, 1868." Memorandum at 2. See *United States v. Sioux Tribes*, 222 Ct.Cl. 421 (Ct.Cl. 1980). Respondent, however, mis-

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[2]It is worthy of notice that the Claims Court is now "standing in the shoes of the now defunct Indian Claims Commission," see *Sioux Tribe v. United States*, 8 Cl.Ct. 80, 92 (1985); Petition Appendix at 46, and as such has the authority to reconsider and correct prior administrative rulings of the Commission. See *United States v. Sioux Tribes*, 222 Ct.Cl. 421, 435 (1980) ("It is a well established principle that an administrative agency may reconsider its own decisions").

construes the nature of the 1980 Court of Claims decision which held that:

> The qualifying language in Article II [of the 1868 Treaty] "except as hereinafter provided" refers to the provision in Article XI by which the Sioux retained certain hunting rights, and the provision in Article XVI treating other land as "unceded Indian land." *The exception makes it clear that the cession of land outside the reservation does not include the latter two interests that the Sioux retained.* Indeed the reference to "unceded Indian land" in Article XVI is inconsistent with the argument that the treaty was not one of cession. The provision that under the treaty certain lands would be "unceded" necessarily indicates that other land was being ceded. [Emphasis Supplied].

Id. at 426.

This interpretation of the treaty—although erroneous since no Sioux lands were actually ceded—suggests that the Sioux were ceding only those lands outside the Great Sioux reservation and outside the Article 11 and 16 areas, i.e., the aboriginal title area east of the Missouri River. The "other land" referred to by the court in Article XVI of the treaty is the 1851 Treaty land.

D. The treaty cession theory is contrary to the express language in the 1877 Act which abrogated Article 16 of the 1868 Treaty.

Article 1 of the 1877 Act expressly provides that:

> [T]he said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

19 Stat. 254, Art. 1. This language clearly indicates that all territory lying outside the reduced Great Sioux Reservation, i.e., recognized and aboriginal title territory, was taken by the 1877 Act.

The abrogation of Article 16 of the 1868 Treaty—which provided that 1851 Treaty lands would remain unceded Indian territory—clearly indicates that Congress intended to take all 1851 Treaty lands lying in the Article 16 area.

E. The issue in this case is how the United States acquired Sioux territory.

In regards to the 1851 treaty lands, respondent asserts that "The United States has owned and exercised dominion over the lands for at least 110 years and the exact date that title legally passed should engender no current interest." Memorandum at 3. The issue in this case is not whether the United States acquired ownership of recognized treaty territory through adverse possession. The issue is whether the United States acquired Sioux recognized and aboriginal territory by cession under the 1868 Treaty or by a taking under the 1877 Act.

The distinction between a treaty cession and a taking in this case is important, since the amount of compensation due for a taking of 1851 Treaty territory under the 1877 Act could amount to millions of dollars in interest under the Good Faith Effort Test.[3] See *United*

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[3]The Federal Circuit also fails to distinguish between the recognized and aboriginal title lands in Docket 74 by treating all claims as aboriginal title claims. See *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1047 (Fed.Cir. 1986), Petition Appendix at 3 ("The 1868 Treaty effected the cession

(Continued on following page)

States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The distinction also involves the question of whether the Sioux should be compensated in 1877 dollar values or 1869 dollar values.[4]

F. Sioux claims under the 1877 Act can be raised in Docket 74.

In a footnote, Respondent asserts the Sioux land claims under the 1877 Act have already been adjudicated in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). There is nothing magic about raising 1877 Act claims in Docket 74-B rather than in Docket 74-A, however.

As stated on page 15 n. 14 of the Petition, Petitioner authorized the filing of Docket 74 only upon the theory that its lands outside the reduced Great Sioux Reservation were confiscated by the 1877 Act. See *Sioux Tribe v. United States*, 500 F.2d 458, 484-86 (Ct.Cl. 1974). Petitioner has never expressly or implicitly authorized claims counsel representing it before the Indian Claims Commission to change the legal theory of the case from a taking under the 1877 Act to a cession under the 1868 Treaty. In any event, the "theory of the pleadings" should not have pre-

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of a large part of land in North and South Dakota, Nebraska, Wyoming, and Montana, to which the Sioux Nation had aboriginal title"). All Sioux lands located in Montana, Wyoming, Nebraska and western North Dakota are lands recognized under the 1851 Treaty.

[4]As noted on page 6 n. 6 of the Petition, the valuation date of 1867 was used by the Indian Claims Commission for Docket 74 lands, since the 1868 treaty was proclaimed on February 24, 1869. See *Sioux Tribe v. United States*, 38 Ind. Cl. Comm. 469, 471, 488 (1976).

vented the Indian Claims Commission (and Claims Court) from applying the applicable law in regards to the 1851 Treaty claims in Docket 74, and should not now prevent Petitioner from having its 1851 Treaty claims reviewed and decided under the Good Faith Effort Test.[5] Indeed, Rule 54(c) of the United States Claims Court expressly provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" [Emphasis Supplied].

II. THE ISSUE OF WHETHER THE PETITIONER CAN BE SEVERED FROM DOCKET 74 IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT.

Docket 74 is a complex case involving conflicting claims by the various tribes that comprise the plaintiff "Sioux Tribe."[6] Because of the confusion caused by these conflicting claims over the years, Petitioner believes that its

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[5]Respondent also asserts that Petitioner's claims were not raised at the trial level and not specifically decided by the Federal Circuit. Memorandum at 1. This court can nevertheless consider such issues in "exceptional cases," such as the instant case. See, e.g., *Stone v. Powell*, 96 S.Ct. 3037, 3046 n. 15 (1976).

[6]For example, there are three divisions of Sioux involved in the claim, the Teton, Yantonai and Santee. Only the Teton have claims to the 1851 Treaty lands. And only the Teton and Yanktonai have claims to the aboriginal title lands. The Santee of Nebraska do not appear to have any claims in Docket 74 and it is a mystery to Petitioner why they are still involved in the claim. Since neither the Yanktonai or Santee have any interest in the recognized title claim, it is understandable why they are not pursuing the claim. Other tribes are apparently not aware they have such claims.

interests have been compromised and never properly advocated.

Moreover, Petitioner did request dismissal from the case when it was pending before the Claims Court. Petitioner passed Resolution No. 83-160 which states in pertinent part as follows:

> NOW, THEREFORE, BE IT RESOLVED, that . . . it is the tribe's official position that Docket 74 be withdrawn from the [Claims Court] and the tribe will seek a restoration of its 1868 Ft. Laramie Treaty lands either through court action or as a final legislative settlement for the Black Hills claims controversy.

Sioux Tribe of Indians v. United States, 8 Cl.Ct. 80, 118 (1985), Petition Appendix at 51. For some unknown reason, the same claims counsel who represented Petitioner in the Claims Court, and now claims Petitioner never requested dismissal from Docket 74, failed to file a motion to dismiss in accordance with Petitioner's wishes. Thus, the reason Petitioner did not file a motion to dismiss itself without prejudice from Docket 74 is because it had no counsel advocating its interests before the claims court.

The issue of whether the petitioner can be severed from Docket 74 is therefore an important issue of federal law which has not been, but should be, settled by the court.

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CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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